(5)

No. 92-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE UNITED STATES OF AMERICA

Petitioner,

v.

JERRY W. CARLTON,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF THE AMERICAN CAUSE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION OF THE AMERICAN CAUSE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Cause respectfully moves this Court for permission to file a brief as *amicus curiae* in support of the respondent in this case.

Pursuant to Supreme Court Rule 37.2, The American Cause sought written consent of all parties to the filing of this brief. Although the petitioner granted such consent, the respondent declined to grant consent. On November 11, 1993, Russell G. Allen, counsel for Respondent Jerry W. Carlton, informed Michael J. George, General Counsel to The American Cause, that he would not give consent to The American Cause to file an *amicus brief*. On December 8, 1993, *amicus* sought consent from the Solicitor General of the United States to the filing of an *amicus* brief. On December 9, 1993 the Solicitor General,

Drew S. Days, III, granted such consent. In the absence of consent from both parties, *amicus* must file this motion with the Court.

Amicus respectfully submits that there are compelling reasons for the Court to grant this motion. As the statement of interest in the attached proposed brief explains, The American Cause is a foundation with a national scope of activities and support, dedicated to constitutional and limited government. Recently, as a part of its activities, The American Cause has focused its attention on the retroactive provisions of the tax laws enacted in the most recent session of Congress and, particularly, the provisions retroactively raising federal estate taxes. As a result, the *amicus* has a significant interest in the issues before the Court in this matter.

Amicus seeks leave of the Court to file this brief in order to bring to the Court's attention certain issues which are not addressed in petitioner's brief and are not likely to appear in respondent's brief.

First, *amicus* points out that this Court and the lower courts have acknowledged that some degree of foreseeability of the future enactment of tax legislation is required for retroactive laws to meet the constitutional requirements of due process. This has led to the formulation of various standards concerning the type of notice of legislative changes in the tax law that might support retroactivity. Unfortunately, there is no uniformity in the decided cases as to what standard should apply. While The American Cause believes that retroactive tax laws, in general, should be held unconstitutional as a violation of due process, if this Court will not adopt such a rule, it nevertheless should provide guidance as to the standard that should be applied in cases involving retroactive tax legislation.

Second, The American Cause believes that the instant case presents the Court with an opportunity to draw a clear distinction between the tests that should be applied when considering the constitutionality of prospective and retrospective legislation. Because retrospective legislation has a much harsher effect on citizens, it should be subjected to a heightened degree of scrutiny.

Third, The American Cause urges the Court to reexamine due process as it pertains to retroactive legislation involving property rights. Over the years, this Court and the lower courts have found constitutional protection for civil or non-economic rights while, at the same time, granting less protection to property rights which are explicitly covered by the guarantees of the Fifth Amendment. The deference that has been accorded to retroactive economic legislation does not comport with the original intent of the Framers of the Constitution.

Finally, the *amicus* emphasizes that it has been active in opposing retroactive tax laws and has an interest in insuring that its views as to the correct application of the Constitution to such laws are heard and considered.

The brief that the *amicus* seeks to file thus supplements but does not duplicate the petition and the other briefs submitted. *Amicus* believes the brief will materially assist the Court in its review.

Accordingly, *amicus* respectfully requests that the Court grant its motion for leave to file a brief as *amicus curiae* in support of the petition.

Respectfully submitted,

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QUESTIONS PRESENTED

I. What degree of unforseeability is necessary to trigger operation of the Fifth Amendment's due process protection?

II. Is the imposition of a retroactive additional estate tax as a means of maximizing revenue an arbitrary and capricious legislative act offending the Fifth Amendment's guarantee of due process?

III. Does the deference granted to retroactive tax legislation destroy the meaning and intent of the Fifth Amendment's due process clause?

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BRIEF OF THE AMERICAN CAUSE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The American Cause is a foundation, with a national scope of activities and support, devoted to the Constitution and the concept of limited government. In its short history, The American Cause has been active in expressing this devotion and advocating means by which limited government can be achieved. Most recently, The American Cause has been involved in efforts to counteract the retroactive provisions of the tax bill passed during the just completed session of Congress. Among the retroactive provisions upon which The American Cause has focused is one involving the federal estate tax. Because the Court's decision in this case is likely to have a significant impact on The American Cause's efforts, *amicus*

wishes to present its views on the appropriate constitutional analysis that should be applied to retroactive tax legislation.

SUMMARY OF THE ARGUMENT

Due process requires that laws be knowable. Decisions made by this Court and lower courts have acknowledged this principle by holding that some degree of foreseeability is required such as constructive or actual notice of the probable future enactment of a particular tax law. The cases, concerning when a retroactive legislative change in the law should have been foreseeable and what legislative or other action will suffice to provide the citizenry with adequate notice of an impending change in the tax laws, have resulted in widely disparate holdings. The Court should take the opportunity, presented by this case, to provide needed guidance as to the standards of foreseeability and adequate notice that should be applied in analyzing the constitutionality of retroactive tax legislation.

This Court has acknowledged that prospective and retrospective legislation should be subjected to different standards of review. Because retrospective laws tend to upset settled expectations, and prospective laws do not, retrospective laws should be disfavored. The mere desire to increase revenue to the general fund is not sufficient to justify the imposition of a retroactive tax and such a tax is thus "harsh and oppressive." It is neither exceptional nor significant that a tax law is motivated by a desire to merely increase revenue for the general fund. All tax legislation shares this omnipresent motivation. Absent exceptional or significant special circumstances, any tax law which disturbs settled expectations should be viewed as harsh and oppressive.

The two standards of review applied in the analysis of retroactive economic legislation have combined to virtually end serious constitutional consideration of such legislation, particularly tax legislation. The "general deference" standard applied

to economic legislation examines only the legitimacy of the legislative end and the rationality of the mechanism employed. The "tax deference" standard modifies the general deference standard by delaying scrutiny until after the nature of the tax and the circumstances in which it is laid is considered. Only after these are considered can a determination be made whether a tax is so harsh and oppressive as to offend the Constitution.

In the case at hand, fundamental rights respecting property were impacted by the retroactive application of a statute. This should trigger heightened scrutiny on review as it would if a non-economic civil right were so impacted. Given that the rights of citizens respecting property were of great importance to the Framers of the Constitution, the current trend towards zealously protecting social rights and abandoning efforts to protect constitutionally important economic rights desiccates the purposes and meaning of a large part of the Constitution and is not in accord with the prevailing view, at the time of ratification of the Constitution, that all rights protected by the Constitution were sacred.

ARGUMENT

I. What degree of unforeseeability is necessary to trigger operation of the Fifth Amendment's due process protection?

Benjamin Cardozo commented in *The Growth of the Law*, "Law as a guide to conduct is reduced to the level of futility if it is unknown and unknowable."[1] Decisions made by this Court and lower courts have acknowledged this due process[2] principle either implicitly or explicitly in holding that some degree of

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[1] B. Cardozo, *The Growth of the Law* 3 (1924).

[2] According to Professor Corwin, the term "due process of law" comes from chapter 3 of 28 Edw. III (1335), which states: "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor

foreseeability, such as constructive or actual notice, of the probable future enactment of a particular tax law is necessary to excuse or justify the retrospective action of such laws.[3]

The American Cause maintains that the only appropriate and constitutionally permissible test of foreseeability should turn on the date of the enactment of tax legislation; *i.e.*, tax legislation should only be granted prospective effect. At a minimum, if tax legislation is to be permitted to have retroactive effect, it should not be permitted to do so on a date earlier than that on which the legislation was introduced. The American Cause recognizes that its interpretation of the mandates of the Constitution are not currently embraced by this Court, nor are its beliefs as to the appropriate standard for assessing foreseeability. There is, nevertheless, a need for this Court to reexamine the concepts of foreseeability and appropriate notice under the Due Process clause.

Despite the general acceptance of the concept of foreseeability, referred to hereinafter as the "notice doctrine," the application of the concept has been inconsistent, even in similar cases. In *Blodgett v. Holden*,[4] and *Estate of Ceppi v. Commissioner*,[5] introduction of a bill in the legislature was deemed to be adequate notice and sufficient for due process. Some decisions were based upon a more liberal understanding of what constituted adequate notice. *Welch v. Henry*,[6] *United States v. Hudson*,[7] and *Miller v. Commissioner*[8] posited that, essentially, all citizens were on notice that tax laws could change and therefore any reasonable period of retroactivity was constitutionally inoffensive. At least one decision seems to stand for the proposition that any conceivable activity pertaining to possible or prospective legislation is sufficient to provide notice, even if the activity is outside of the legislature. *Purvis v. United States*.[9]

disinherited, nor put to death, without he be brought to answer by due process of law." This statute, in turn, has as its distinguished ancestor the Magna Carta's requirement that a free man be treated by the King and his agents in accordance with the law of the land (*per legem terrae*). Corwin, *The Constitution And What It Means Today*, 326 (13th ed. 1973).

[3] See, generally, *United States v. Darusmont*, 449 U.S. 292 (1981); *Welch v. Henry*, 305 U.S. 134 (1938); *Milliken v. United States*, 283 U.S. 15 (1931); *Untermyer v. Anderson*, 276 U.S. 440 (1928); *Fein v. United States*, 730 F.2d 1211 (8th Cir. 1984); *Estate of Ceppi v. Commissioner*, 698 F.2d 17 (1st Cir. 1983); *Buttke v. Commissioner*, 625 F.2d 202 (8th Cir. 1980); *Purvis v. United States*, 501 F.2d 311 (9th Cir. 1974).

[4] 275 U.S. 142 (1928)

[5] 698 F.2d 17 (1st Cir. 1983).

These notice doctrine cases, although all based upon the well settled proposition that citizens should have some hope of knowing what the law is, express divergent views on just what degree of foreseeability is necessary to guarantee due process. The result is that multiple and often conflicting standards are applied. The ensuing confusion renders the standard itself as unknowable as the legislation in question.

Furthermore, the notice doctrine is fundamentally flawed. Should two laws both be proposed, one imposing an additional tax on a particular economic activity and one reducing the tax on the same activity, the economically active and legislatively aware citizen is placed squarely on the very sharp horns of a dilemma. Obviously, there is no way such a citizen can be justly said to be apprised of anything. As was stated in *Untermyer*, such a view

> "would produce insuperable difficulties touching interpretation and practical application of the statute and render impossible proper understanding of the burden intended to be imposed. The taxpayer may justly

[6] 305 U.S. 134 (1938).

[7] 299 U.S. 498 (1937).

[8] 115 F.2d 479 (9th Cir. 1940).

[9] 501 F.2d 311 (9th Cir. 1974).

> demand to know when and how he becomes liable for taxes — he cannot foresee and ought not to be required to guess the outcome of pending measures. The future of every bill while before Congress is necessarily uncertain. The will of the lawmakers is not definitely expressed until final action thereon has been taken."[10]

Indeed, the more likely scenario is that scores of conflicting laws will be proposed by any number of participants in that confused maelstrom known as the legislative process. Even if we assume, *arguendo*, that a taxpayer has the means and intestinal fortitude to decipher the meaning and effect of these numerous proposals, the taxpayer is reduced to the role of a handicapper: forced to place bets, with his economic well-being at stake, over which of a multitude of proposed laws will cross the finish line first. Absent a gift of prescience, the taxpayer is no better off with such "notice" than without it.

Complicating the notice doctrine even further is the rule regarding wholly new taxes.[11] Presumably, any tax which is not wholly new is foreseeable to some extent depending upon which of the foregoing standards of notice is chosen. Consequently, wholly new taxes would presumably receive greater scrutiny and be more likely to offend due process.[12] Although a new law imposing additional burdens upon a citizen would commonly be thought to be a new tax, the wholly new tax rule strictly construes the meaning of the phrase "wholly new tax" so as to include only legislation which taxes an entirely new class of

[10] *Untermyer v. Anderson*, 276 U.S. 440, 445-446 (1928).

[11] See generally, *Nichols v. Coolidge*, 274 U.S. 531 (1927); *Untermyer v. Anderson*, 276 U.S. 440 (1928).

[12] *Milliken v. United States*, 283 U.S. 15 (1931); *Fein v. United States*, 730 F.2d 121 (8th Cir. 1984); *Estate of Ceppi v. Commissioner*, 698 F.2d 17 (1st Cir. 1983); *Buttke v. Commissioner*, 625 F.2d 202 (8th Cir. 1980); *Purvis v. United States*, 501 F.2d 311 (9th Cir. 1974).

economic activity.[13] All other taxes, being mere changes of effect rather than of class, are excluded from the greater scrutiny suggested by the rule.

Although the rule seems relatively well ensconced in constitutional thought regarding tax legislation[14], construction of the rule in application ignores the practical effect of a change in tax structure. It is cold comfort to the citizen, whose taxes ratchet up due to a legislative decision to retroactively tax some activity at a much higher rate, that the tax is not "wholly new." Insofar as the tax creates additional burdens and affects the citizen's economic well-being, the tax is wholly new in its practical effect upon individual taxpayers. This exceedingly strict construction of the term "wholly new" robs it of practical meaning and eviscerates what might otherwise be a bulwark against legislative abuse. If accepted as controlling law, the common practice of strictly construing "wholly new" merely stands for the proposition that the confusingly inconsistent notice doctrine discussed *supra* be applied to all tax legislation. Until or unless Congress enacts a tax on a heretofore untaxed sphere of activity (*e.g.*, a sales or value added tax) the rule has no application and the entirety of tax legislation is to be governed by the notice doctrine without moderation by the wholly new tax rule.

At their core, both the notice doctrine and the wholly new tax rule, are attempts to provide some means of ensuring that citizens are able to know the law and are judicial acknowledgements that foreseeability of a new retroactive law is constitutionally desirable. Clearly, the ability of a citizen to know the law is fundamental to the concept of due process.[15] However, as noted in the preceding discussion, the multifaceted and inter-

[13] *Milliken v. United States*, 283 U.S. 15 (1931).

[14] See notes 11-12, *supra*.

[15] B. Cardozo, *The Growth of the Law* 3 (1924).

nally conflicted notice doctrine fails in providing an adequate structural safeguard and flounders in its attempt to protect the individual citizen from the danger of unforeseeability. Similarly, the wholly new tax rule is almost useless as a safeguard in that it has virtually no practical application as commonly construed. The inadequacy of the current and lamentable state of foreseeability as a constitutional restriction on legislative action is clear. Despite its constitutional necessity, foreseeability as it pertains to legislative enactments of retroactive economic laws is a toothless tiger.

The *amicus curiae* The American Cause urges the Court to redress the currently disarrayed area of foreseeability. In the case at hand, the Respondent could not predict the subsequent legislative enactment and should not be required to do so. The Court is now provided with the opportunity to settle the disturbed and murky waters surrounding the issue of foreseeability.

II. Does the imposition of a retroactive additional estate tax as a means of maximizing revenue offend the Fifth Amendment's guarantee of due process?

A. Constitutional Examination of Retroactive Laws Must be Harsher than of Prospective Laws.

It is well established that the legislature cannot act arbitrarily, capriciously, irrationally or in furtherance of non-legitimate legislative ends.[16] Nor can the legislature, in light of the circumstances, act in a harsh or oppressive manner.[17] It is less well established what many of the above terms mean.

The raising of revenue is certainly a legitimate legislative end. Obviously, no government could function for long without

[16] *United States v. Sperry*, 493 U.S. 52 (1989); *Pension Benefit Guaranty Corp v. R.A. Gray*, 467 U.S. 717 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[17] *United States v. Darusmont*, 446 U.S. 292 (1981); *United States v. Hemme*, 476 U.S. 558 (1986).

some mechanism for raising revenue. However, the means by which revenue is raised is subject to abuse and for that reason the Fifth Amendment guarantees that no one be deprived of life, liberty or *property* without due process of law.[18] It is the means by which the government obtains property that is the central concern of constitutional due process scrutiny and it is the means employed by the government that is the central issue in the instant case.

Here, the government, by retrospective legislation, deprived the Respondent of a tax deduction upon which he relied to his detriment by engaging in a transaction through which he lost over six-hundred thousand dollars.[19] The government, it is well established,[20] had as its sole reason for enacting this retrospective law a desire to maximize its revenue. No suggestion of a national emergency or other lesser but important reason is noted in the pleadings. The legislature's enactment was motivated merely by a desire to secure for the general fund adequate revenue.

In examining the facts of the case at hand, it becomes apparent that the means employed, a retroactive tax, should be examined with some skepticism. The government does not argue convincingly that prospective legislation would be inadequate to raise the required funds. Simply put, the government need not have made the statute in question retroactive since it could have accomplished this goal, raising revenue, prospectively. Although there is some authority which stands for the proposition that no essential difference exists from a constitutional standpoint between retrospective and prospective laws,[21]

[18] U.S. Const., amend. V.

[19] Brief for the United States at 4n.6.

[20] *Id.* at 5-6.

[21] *Stockdale v. Atlantic Ins. Co.*, 87 U.S. 348 (20 Wall. 323) (1874). Congress may pass a retroactive law if the purpose is clear and that purpose is within the power of Congress.

this proposition has clearly not withstood the test of time and the more convincing authority is the more recent. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976) this Court stated:

> "It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former."

Based upon the language in *Usery*, *supra*, it seems an obvious conclusion that retrospective legislation should be subject to harsher scrutiny than prospective legislation. *Id.* It thus logically follows that, where one variety of legislation is favored constitutionally over another, the disfavored legislation should be accompanied by, at a minimum, special and additional circumstances making the disfavored legislation acceptable to due process scrutiny. Such circumstances need not necessarily rise to the level of a national emergency, but something more than the omnipresent need to raise revenue should be required.[22]

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[22] The possibilities abound as to what might constitute special circumstances. One such is the "curative effect" of the legislation. Where legislation contains a non-substantive error, and correction of such an error does not necessarily change the effect of the law (*e.g.*, a change to bring the clear meaning in accord with judicially interpreted meaning), special circumstances can be said to exist. *Wiggins v. Commissioner*, 904 F.2d 311 (5th Cir. 1990) concerns such curative purpose. *Id.* citing *Canisius College v. United States*, 799 F.2d 18, 27 (2nd Cir. 1986) cert. denied 481 U.S. 1014 (1987): "Where legislation is curative, retroactive application may be constitutional despite a long period [4 years] of retroactivity." *Wiggins*, citing *Fife v. Commissioner*, 82 T.C. 1 (1984): "Congress's intention in enacting the new provision was to clarify existing law, not to change the law." Of course, the strongest compelling interest is an emergency such as war; in *Lichter v. U.S.*, 334 U.S. 742 (1948), the government was allowed to renegotiate contracts to prevent profiteering.

The facts of this case reveal no compelling special circumstances so as to justify the choice of a retrospective over a prospective tax mechanism. The sole motivation for the enactment was concern by the legislature for maximizing revenue after Congress' realization that the 1986 amendment would lose more revenue than predicted at the time it was enacted. Clearly, such an end could have been achieved by prospective legislation. Absent special and compelling circumstances, the law as expressed in *Usery*, *supra*, requires an elevated level of scrutiny of the enactment. Simply wanting to increase funds is insufficient as a special circumstance for the obvious reason that all tax laws have as their purpose the raising of revenue. The contrary view renders the language of this Court in *Usery* mere surplusage without effect or meaning.

The *amicus* The American Cause urges this Court to correct the misunderstanding of *Usery* and enunciate a final and clear exposition of the proposition that retrospective legislation must by constitutional necessity be disfavored if prospective legislation is adequate to achieve the legitimate legislative end of raising revenue.

B. Imposing a Retroactive Tax Merely to Raise Revenue is Unduly Harsh and Oppressive.

The government argues, citing *Nebbia v. New York*, 291 U.S. 502, 525 (1934), that respecting legislation by the Congress in commercial matters, the Fifth Amendment's guarantee of due process requires only that "the law shall not be unreasonable, arbitrary and capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."[23] Indeed, the government goes on to point out that this Court has stated even more forcefully[24] in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 729:

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[23] Brief for the United States at 12.

[24] *Id.*

> "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches."

The government thus restates the proposition that the judicial branch, in examining economic legislation for compliance with the Fifth Amendment's due process clause, need only examine whether legislation is rationally designed to accomplish a legitimate legislative purpose.[25] Under the current standard, economic legislation which has a retroactive effect is subject to a level of scrutiny identical to that used to examine any enactment, retroactive or not. Thus, as above, so long as the government can show that the retroactivity of the legislation is supported by: (1) a legitimate legislative purpose; and this purpose is achieved by (2) rational means; the retrospective law will not offend the Fifth Amendment's due process clause.

In matters concerning tax legislation, the standard of review is, on its face, an even milder level of scrutiny.[26] The nature of a retroactive tax and the circumstances surrounding its enactment are first examined.[27] Only after taking these factors into consideration may the next step be performed, a determination if the legislation's effect is so harsh, in light of the statute's

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[25] *Id.*

[26] *United States v. Hemme*, 476 U.S. 558 (1986); *United States v. Darusmont*, 446 U.S. 292 (1981); *Welch v. Henry*, 305 U.S. 134 (1938). In *Hemme*, the most recent case, this Court restated the rule expressed earlier in *Welch*: "[W]e must 'consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.'" at 568-569.

[27] *Id.*

nature and circumstances, as to transgress the Constitution.[28] This test presumably allows a law which may be deemed unduly harsh and oppressive so as to offend due process to survive if there is a good enough reason for the law — such a standard may also be termed the "good excuse" standard.

In the case at hand; the Respondent reviewed the law and made irrevocable decisions based upon a sound understanding of that law.[29] Subsequent to those decisions, the law was changed retroactively.[30] The government now argues that this change in the existing law was not unduly harsh and oppressive since it was justified by the good excuse of revenue maximization. The American Cause suggests to the Court that merely desiring to increase revenue to the general fund is not a meaningful "special circumstance" and is thus an insufficient excuse to justify the imposition of a retroactive tax.

Under the standard expressed in *Hemme*,[31] scrutiny of the effects of the new law is to be done only after an evaluation of the nature and circumstances of the tax are taken into consideration. As previously discussed, since all tax laws have as their goal and motivation the raising of revenue, this is not a "circumstance" worthy of significant consideration. No exceptional or peculiar circumstances are present where the legislative desire is merely to increase revenue for the general fund. As a consequence, any reliance upon existing law which is disturbed by a subsequent retrospective legislative act should be viewed as harsh and oppressive where the injured party changed position in detrimental reliance on the existing law. Such a view is in accord with the standard most recently enunciated in *Hemme*.[32]

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[28] *Id.*

[29] Respondent's Brief in Opposition at 3.

[30] Brief for the United States at 6.

[31] See note 26, *supra*.

[32] *United States v. Hemme*, 476 U.S. 558 (1986).

The *amicus* The American Cause therefore urges the Court to provide specific guidance regarding the extent of scrutiny required of retrospective tax legislation and clarify the meaning of its directive to consider the nature and circumstances of a retrospective tax.

III. Does the deference granted to retroactive tax legislation destroy the meaning and intent of the Fifth Amendment's due process clause?

A. Judicial Abdication in the Field of Retroactive Economic Legislation Does Not Serve the Constitution.

It has been pointed out that two standards of review apply to retroactive economic legislation.[33] These are the doctrines of "general deference" and "tax deference."[34] General deference is the standard wherein a legislative act respecting economic policy shall be examined only for the legitimacy of its end and for the rational basis of its mechanism.[35] Tax deference is the standard that legislative acts in the economic field shall only be subject to scrutiny after the nature of the tax and the circumstances in which it is laid is considered prior to examining whether the tax is so harsh and oppressive as to offend the Constitution.[36] These two doctrines in combined application represent a virtual abandonment of the field of Constitutional review of economic legislation, particularly of tax legislation.[37]

[33] Note, *Has Due Process Struck Out?*, 42 Duke L.J. 1069, 1070.

[34] *Id.* at 1070.

[35] *Id.*

[36] *Id.*

[37] See, e.g., *United States v. Sperry*, 493 U.S. 52 (1989); *Pension Benefit Guaranty Corp v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). These cases, despite the cautionary language, have come to be interpreted as judicial deference for retroactive economic laws. This judicial doctrine represents a departure from the historic hostility to retroactive enactments by the legislature.

This abdication is all the more surprising and disappointing given the traditional and historical hostility to retroactive legislation which is deeply embedded in our jurisprudence.[38]

The *amicus curiae*, The American Cause, believes that such an abdication, if true, would be a sad commentary on the vitality of the Constitution and of the due process clause in particular. As Justice Story stated, "Retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact."[39]

If the Constitution cannot reach legislative enactments which are, as Justice Story noted, "generally unjust" what does the phrase "due process" mean? The American Cause asserts that the Constitution's guarantee of due process cannot embrace "generally unjust" laws. The American Cause thus urges the Court to reconsider the direction of the evolving due process doctrine and overrule such decisions as exist which embrace generally unjust retrospective laws. The American Cause asks that the Court re-examine the original intent of the Framers and make a clear statement that our Constitution does not tolerate retroactive laws. The *amicus* submits that should the existing and long line of cases be allowed to stand without such action by the Court, due process will continue to lose its force as a limitation on government actions and the Framers' intentions and efforts will have been for nought.

B. The Court Should Reexamine Due Process As It Pertains To Retroactive Legislation.

The American Cause is cognizant of the Court's reluctance, in the aftermath of the *Lochner* [40] case, to sit as a "superlegisla-

[38] Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 Minn. L. Rev. 775.

[39] 2 J. Story, *Commentaries on the Constitution of the United States* § 1398 (5th ed. 1891).

[40] *Lochner v. New York*, 198 U.S. 45 (1905).

ture" and substitute its judgements for those of the legislature.[41] As a practical matter, however, the doctrine of substantive due process clearly lives on.[42] The unifying aspect of these cases is a tacit judicial assumption that the Constitution protects civil or non-economic rights and provides a substantially lesser degree of protection to rights regarding property. However, this view is untenable in light of the historical context of the framing of the Constitution.

A cursory examination of the Constitution reveals a deeply rooted concern for property rights.[43] This accurately reflects the importance of all rights to the Framers. The father of the Constitution, James Madison, stated at the Constitutional Convention that, "The primary objects of civil society are in the security of property and the public safety."[44] Later, a prominent Framer, Justice Patterson, wrote in *Van Horne's Lessee v. Dorrance*,[45] "The preservation of property . . . is the primary object of the social compact."[46] In *Boyd v. United States*,[47] this Court wrote: "The great end for which men entered into society was to secure their property. This right is preserved sacred."[48]

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[41] See, *e.g.*, *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

[42] See, *e.g.*, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. E. Cleveland*, 431 U.S. 494 (1977); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[43] See, *e.g.*, U.S. Cons., art. I, § 2, par. 3; art. I, § 9, pars. 3 through 7; art. I, § 10, par. 2; art. IV, § 2, par. 1; art. VI, par. 1; amends. III, IV, V and X.

[44] 1 M. Farrand, *The Records of the Federal Convention of 1787* 147 (1911).

[45] 2 U.S. (2 Dall.) 304 (1795).

[46] *Id.* at 309.

[47] 116 U.S. 616 (1885)

[48] *Id.* at 627.

The Framers ascribed to the principle that liberty and a well ordered society could only exist where one's rights were protected. That this fundamental principle was embodied in the Constitution and guaranteed the protection of those rights, including property rights, was clearly understood and shared by the federal judiciary well after the Constitutional Convention.[49] It is thus fair to say that economic rights occupied a level of importance in the Framers minds approaching that of, if not equal to, non-economic rights. The modern trend to emphasize the latter and ignore the former is not in accord with the prevailing view at the time of ratification and is thus not in keeping with the original intent of the Framers. In the case at hand, the *fundamental right* of property was impacted by the retroactive application of a statute. This should, in accordance with current cases,[50] trigger heightened scrutiny. Any contrary view, in light of our constitutional history, would by necessity be inconsistent with the intent of the Framers.

The current state of the law in the area of economic legislation, particularly regarding tax legislation, is far from being in accord with the Framers' intent. The doctrines of "general deference" and "tax deference" represent a remarkable indulgence by the judiciary of legislative behavior when it affects economic rights. The present state of constitutional jurisprudence shows much less tolerance of legislative incursions when they affect social or civil rights. Given that the rights of citizens respecting property were of great importance to the Framers, the current judicial bias towards zealously protecting social or civil rights and against affording at least comparable protection to equally or nearly equally important economic rights desiccates the purposes and meaning of a large part of the Constitution.

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[49] *Supra*, notes 45 through 48.

[50] *Supra*, note 42.

The *amicus*, The American Cause, emphatically does not ask that the Court return to an era of activist jurisprudence abandoned in the aftermath of *Lochner*.[51] Rather, The American Cause asks that the Court revisit the issue of due process and bring its application into balance and accord with the original intent and understanding of the Framers when they drafted the Constitution — an understanding which was and is incompatible with retroactive laws.

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51 *Supra*, note 40.

CONCLUSION

The decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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